86-671

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALICE G. UTSEY,

Appellant

v.

DEPARTMENT OF THE ARMY,

Appellee

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

I.

Whether the time limits of 29 C.F.R. Sections 1613.233 and 1613.281(c), for filing an appeal to the EEOC or a civil action in district court, are jurisdictional prerequisites to suit in Federal Court.

II.

Whether the District Court is required to hold trial on the merits of a case once it is established in the pleadings that circumstances exist which may justify equitable tolling of the time limitations of 29 C.F.R. Section 1613.233 and Section 1613.281(c).

III.

Whether the EEOC's denial of appellant's untimely appeal is a final action for purposes of the time filing requirements of 29 C.F.R. Section

1613.233 and 1613.281(c).

IV.

Whether the doctrine of equitable tolling established by Zipes v. Trans World Airlines, 455 U.S. 385 (1982) applies in cases against the Federal Government arising under 92 U.S.C. Section 2000e-16, as equally as it applies to civilian employers in cases arising under 42 U.S.C. 2000e-2.

V.

Whether the doctrine of equitable tolling established by Zipes v. Trans World Airlines, 455 U.S. 385 (1982) applies to all the filing time requirements of Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. Sections 2000e, et seq, or only to the filing time requirement for filing a charge of discrimination with the EEOC.

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JURISDICTION

This is an appeal of a memorandum decision of the United States Court of Appeals for the Fourth Circuit, Number 86-1018, dated and entered on June 30, 1986 (App. 1), which affirmed a judgment of the United States District Court for the Eastern District of Virginia granting the appellee's motion to dismiss appellant's civil action for lack of subject matter jurisdiction.

The notice of this appeal was filed in the United States Court of Appeals for the Fourth Circuit on the 29th day of September, 1986. (App. 3).

This appeal arises under the laws of the United States, specifically Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and 29 C.F.R. Section 1613.233 and Section 1613.281. The jurisdiction of

this Court is invoked under Title 28, U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e

29 C.F.R. Section 1613.233

29 C.F.R. Section 1613.281

See appendix for text of pertinent provisions.

STATEMENT OF CASE

Alice G. Utsey was a civilian employee of the Department of the Army who was dismissed from her job in February of 1983. Following her dismissal, she filed a claim of discrimination with the Department of the Army. Mrs. Utsey was afforded the rights and benefits of the Army's administrative EEOC processes. On February 8, 1985, Mrs. Utsey received notice of the Army's final decision

denying her claim. On March 11, 1985, Mrs. Utsey, acting pro se, filed an appeal of her claim with the EEOC. This appeal was filed beyond the time limits established by 29 C.F.R. Section 1613.233 and Section 1613.281. (App. 5, 7, 8).

On May 14, 1985, prior to a determination on her appeal by the EEOC, Mrs. Utsey, pro se, filed a civil action in the United States District Court for the Eastern District of Virginia, alleging jurisdiction under 42 U.S.C. Sections 2000e, et seq.. The EEOC made determination on Mrs. Utsey's appeal on July 10, 1985, denying the appeal because of her failure to file the same with the EEOC within the time limits prescribed by 29 C.F.R. Sections 1613.233 and 1613.281. Mrs. Utsey obtained counsel and was granted leave of the court to file a

late response to the Department of the Army's motion to dismiss. Mrs. Utsey was also given leave to file an amended complaint, doing so on August 12, 1986. (App. 4, 7, 8).

The District Court, granting the Army's motion to dismiss, ruled that the final administrative action in the case was the Army's denial of Mrs. Utsey's claim and not the EEOC's denial of her late appeal. The District Court then proceeded on the presumption that the time limits of 29 C.F.R. Sections 1613.233 and 1613.281 are jurisdictional prerequisites to action in Federal Court. Since Mrs. Utsey failed to comply with such limitations after receiving the Army's final determination, the Court dismissed her complaint for lack of subject matter jurisdiction. (App. 2).

On appeal to the Court of

Appeals for the Fourth Circuit, Mrs. Utsey, by counsel, argued that, regardless of the issue of what constitutes a final action for purpose of time filing limitations of 29 C.F.R. Sections 1613.233 and 1613.281, the District Court acted on the incorrect presumption that such time limitations are jurisdictional prerequisites. Counsel for Mrs. Utsey argued that such time limits are more in the nature of statutes of limitations and as such are subject to the doctrine of equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). Because of its incorrect presumption as to the nature of the time limits, the District Court failed to properly consider circumstances which would warrant application of the doctrine of equitable tolling, thereby preserving Mrs. Utsey's right to bring a civil action in the

district court. In addition, counsel for Mrs. Utsey appealed the district court's determination that the EEOC's denial of Mrs. Utsey's untimely appeal was not a final action for purposes of the 29 C.F.R. Sections 1613.233 and 1613.281 time limitations.

The Court of Appeals affirmed the decision of the District Court, holding that Mrs. Utsey's lawsuit was not timely. The memorandum of the decision did not address the issue as to whether the EEOC's denial of Mrs. Utsey's complaint was a "final action." The Court ruled further that despite uncertainties as to the applicability and scope of the equitable tolling doctrine, the circumstances and facts of this case did not warrant that such doctrine be applied. (App. 1).

REASONS FOR ALLOWANCE OF WRIT

The Federal Courts are in need of clarifying guidance as to the precise nature of the time filing requirements established in the Code of Federal Regulations pursuant to 42 U.S.C. 2000e-16.

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Court ruled that the filing time requirements for filing a charge of discrimination with the EEOC was more in the nature of a statute of limitation, therefore subject to equitable tolling. This decision overruled the long standing conclusions of lower federal courts that such filing time requirements were jurisdictional prerequisites for further review of a petitioner's claim.

However, since Zipes there has been no further amplification on the

scope of application of equitable tolling to other time filing requirements contained in the various provisions of Title VII of the Civil Rights Act of 1964, as codified by 42 U.S.C. Sections 2000e, et seq.

One specific area of uncertainty in the application of the Zipes doctrine is whether the time filing requirement for filing a civil action is also subject to equitable tolling. Such a possibility has been implied by the Supreme Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984). However, due to the fact that this Court concluded that the equitable circumstances did not exist which would warrant tolling of the time limits for filing a civil action, this issue was not definitively addressed in that case.

The nature of what is equitable does not lend itself to a set formula

which would allow such determinations upon appeal without thorough exploration of the facts at trial. In Baldwin, the Court discussed a few situations where equitable tolling might be warranted. That discussion, we assert, was not intended to be an all-inclusive list of such situations. It is error for Federal Courts of Appeal to use the Baldwin opinion as a restrictive guideline in making determinations on matters which rightfully require a trial on the merits of the case in the district courts. Present interpretation of Baldwin is encouraging the circuit courts to make such limited factual determinations, as the Court of Appeals did in the present case.

The allowance of the writ of certiorari in this case will provide the opportunity for the Court to rule definitively whether the Zipes doctrine

of equitable tolling is to be applied to all time filing requirements of 42 U.S.C. Sections 2000, et seq., or only to the time limits for filing a charge of discrimination with the EEOC. Consideration of this case will also provide the Court the opportunity to further amplify the precedential limitations of Baldwin.

Another significant issue that shall be determined by this Court is whether the Zipes doctrine of equitable tolling is equally applicable in situations involving the Federal government as in circumstances involving a private sector defendant. The Zipes decision provides private sector employees with a considerable benefit to the provisions of 42 U.S.C. Sections 2000e, et seq. The purpose of 42 U.S.C. Section 2000e-16 is to provide employees of the Federal Government the

same benefits and protections of Title VIi of the Civil Rights Act as are enjoyed by their counterparts in the private sector.

There is a tendency among the Courts to require plaintiffs in cases against the Federal Government to overcome a presumption against equitably estopping the Federal Government from asserting its rights. Schweiker v. Hansen, 450 U.S. 785 (1981). A private sector defendant does not enjoy such a presumption, and a private sector plaintiff is not required to overcome such a presumption. The Zipes doctrine is by its nature a means by which the plaintiff can equitably estop the defendant from asserting legal protections from the running of the time filing limitation. The burden of overcoming the presumption established

by Schweiker is accomplished by the plaintiff's showing that the Federal Government acted with affirmative misconduct. This standard has been applied against federal employees in cases arising under 42 U.S.C. 2000e-16. Zografov v. V.A. Medical Center, 779 F.2d 967 (4th Cir. 1985). However, the application of such a standard in cases arising under 42 U.S.C. 2000e-16, while not applying the same standard in cases arising under 42 U.S.C. 2000e-2, appears to be totally inconsistent with the Congressional intent of providing Federal employees the same protection and benefits provided to civilian employees.

CONCLUSION

For the foregoing reasons, appellant Alice G. Utsey respectfully

requests that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ALICE G. UTSEY

By: _____
Of Counsel

CERTIFICATE OF MAILING

I hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari and of the accampanying Appendix were deposited in a United States post office, with first-class postage pre-paid, and properly addressed to the Clerk of this Court, and that 3 copies each of this Petition were mailed to Justin W. Williams, Esquire, Counsel for Appellee, and to the the Solicitor General, properly addressed to their respective addresses this 29th day of September, 1986.

F. O. Blechman

STATE OF VIRGINIA

CITY OF NEWPORT NEWS, to wit:

I, the undersigned, a Notary Public, in and for the Commonwealth of Virginia at Large, do hereby certify that F. O. BLECHMAN, whose name is signed on the foregoing Certificate of Mailing, has acknowledged the same before me in the City and State aforesaid.

Given under my hand this 29th day of September, 1986.

Marguerite W Bridges
Notary Public

My commission expires: Nov 21, 1989

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APPENDIX

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APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-1018

ALICE G. UTSEY,

Appellant,

v.

DEPARTMENT OF THE ARMY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, Senior District Judge. (C/A 85-69-NN).

Argued: May 9, 1986

Decided: June 30, 1986

Before WIDENER and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Martin K. Griffin for Appellant; Larry W. Shelton, Assistant United States Attorney (Justin W. Williams, United States Attorney on brief) for Appellee.

PER CURIAM:

Alice Utsey, a black woman, was hired in October 1982 as a temporary clerk-typist at the United States Army's 60th Ordinance Group in Zqeibruecken, West Germany. Her period of employment was originally scheduled to terminate on December 3, 1982, but it as extended until September 23, 1983.

However, Utsey's supervisor became dissatisfied with the quality of her work and informed her of his decision to terminate her employment in February 1983. Utsey requested and was given permission to resign rather than be terminated.

Utsey believed that the quality of her work was satisfactory and that the true reason for her dismissal was racial discrimination on the part of her supervisors.

On April 18, 1983, Utsey filed a

discrimination charge with the Army. The U.S. Army Civilian Appellate Review Agency investigated her complaint and concluded that no discrimination had taken place. Utsey received notice of the Army's final decision on February 8, 1985.

Utsey filed an appeal with the Equal Employment Opportunity Commission on March 11, 1985, which was 30 days after she received notice of the Army's decision. On May 14, 1985, Utsey filed the present action in the Untied States District Court for the Eastern District of Virginia. On July 10, 1985, the EEOC, affirmed by the district court on December 13, 1985, dismissed Utsey's appeal as untimely filed.

A federal employee who believes that he or she has been the victim of employment discrimination must bring the matter to the attention of the agency's

Equal Employment Opportunity Counselor within 30 days of the allegedly discriminatory incident. The employee must then file a written complaint within 15 days of the final interview with the EEO counselor. 29 C.F.R. § 1613.214(a).

After filing a complaint with the agency, the employee may choose to proceed directly to federal court. The employee may file suit in federal court after 180 days from the filing of the EEO complaint with the agency, if the agency has not rendered a final decision, but must then file suit within 30 days after receiving notice of the final decision.
42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1613.281(a)-(b).

Instead of filing suit directly, the employee may choose to appeal the agency's decision to the EEOC. The

appeal to the EEOC in that case must be filed within 20 days after the employee receives notice of the agency's final decision. 29 C.F.R. § 1613.233. The employee may then file suit in federal court after 180 days from the filing of the appeal with the EEOC, if the EEOC has not rendered a final decision. Alternatively, the employee may wait for the EEOC's final decision, but must then file suit within 30 days after receiving notice of the final decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1613.281(c)-(d).

The present action was properly dismissed because Utsey failed to file suit in time. Utsey received notice of the Army's final decision on February 8, 1985. She then had two options; to file suit directly or to appeal to the EEOC. She attempted to do both, but both attempts were untimely.

Under 42 U.S.C. § 2000e-16(c) and 29 C.F.R. § 1613.281(a), Utsey could have filed suit within 30 days after receiving notice of the Army's decision. To comply with that rule, she would have had to file her suit on or before March 11, 1985. She did not file until May 14, 1985.

Alternatively, Utsey could have pursued her EEOC appeal first. Her appeal to the EEOC was not timely filed. Under 29 C.F.R. § 1613.233, she was required to file her EEOC appeal within 20 days after receiving notice of the Army's decision. That meant that she had to file her EEOC appeal on or before March 1, 1985. However, her appeal was file don March 11, 1985, ten days too late.

Utsey sought to escape her apparently impossible position by arguing that (1) she was entitled to

file her lawsuit within 30 calendar days after receipt of "final action" taken by the EEOC; (2) she filed her lawsuit on May 14, 1985, before the issuance of the EEOC's final decision on July 10, 1985 (3) therefore she met the timeliness requirement of the statute and the regulation.

The district court assumed that if the EEOC's dismissal of her appeal on July 10, 1985, constituted "final action," Utsey's court action was timely filed. However, the court then concluded that it did not.

It was not necessary for the district court to decide that question, however. Even assuming that the EEOC's dismissal of the appeal as untimely was "final action" within the meaning of the statute and the regulation, we have concluded that her lawsuit was not timely.

The implicit assumption in Utsey's argument is that a lawsuit is timely filed under the statute and regulation if it is filed before issuance of the EEOC's final decision. That assumption is mistaken. The regulation, 29 C.F.R. § 1613.281(c) says explicitly that any court action must be filed "within 30 days after receipt of the final action taken by the Commission" (emphasis added). That language indicates that it does not apply to lawsuits filed before the EEOC decision is issued. Lawsuits filed before the EEOC decision are covered by § 1613.281(d), which provides that an employee may file a lawsuit before the EEOC decision is rendered, but only after first waiting 180 days after the appeal is filed with the EEOC.

The applicable regulation here, then is 29 C.F.R. § 1613.281(d). As

long as no EEOC decision had been rendered, Utsey was required to wait 180 days before filing her lawsuit. She did not do that. She filed her EEOC appeal on March 11, 1985, and her court action on May 14, 1985, less than 180 days later. Thus, under the applicable regulation, her court action was premature.

Utsey alternatively argues that, even though her court action was not timely filed, the 30-day filing period allowed after receipt of the Army's final decision should be tolled, so that her filing on May 14, 1985, instead of March 11, 1985, would be excused.

Courts are undecided as to whether the 30-day filing period may be equitably tolled. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 392-98 (1982), a case involving a private defendant, the Supreme Court

held that the filing of a timely charge with the EEOC was a requirement in the nature of a statute of limitations, and subject to equitable tolling. The court distinguished the requirement from "jurisdictional" requirements which are not subject to tolling. However, the Court did not address the question whether the time requirement for filing a court action was subject to tolling.

In Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), the Supreme Court held that an employees' discrimination action against a private employer was barred where the suit was filed after the expiration of the allotted period following the final decision of the EEOC. However, the Court did not decide whether or not that time period could be equitably tolled. It appeared to recognize the possibility that the period could be tolled, but

held that equitable tolling was not warranted on the facts of the case. Id. at 151-52.

It is not necessary in the present cast to decide whether or not the period for filing suit after notice of the final agency decision may be tolled. Here, as in Baldwin, equitable tolling would not in any event be warranted on the basis of the facts. In Baldwin, the Court reviewed some of the situations where tolling is warranted. Tolling of the filing period is justified where the claimant has received inadequate notice of the agency's decision; where a motion for appointment of counsel is pending; where the court has led the plaintiff to believe that she has done all that is required of her; or where misconduct on the part of the defendant has lulled the

plaintiff into inaction. Id. at 151. None of those situations is present here. Utsey seeks to rely on her difficulty in understanding the Army's letter informing her of her rights, a reliance which, of itself, is nearly incomprehensible. In any event, such difficulty alone is not a ground for tolling. We note that if Utsey were to prevail on that argument, we would undermine her own case on the merits; a difficulty in reading comprehension would merely reinforce the likely reasonableness of Utsey's supervisor in concluding that the quality of her work left something to be desired.

It is our conclusion that Utsey's complaint in the present action was not timely filed under 42 U.S.C. § 2000e-16 and 29 C.F.R. § 1613.281. No circumstances have been presented that

would warrant equitable tolling of the filing period. Accordingly, the district court's dismissal of the complaint was correct.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

ALICE G. UTSEY,

Plaintiff,

v. CIVIL ACTION NO. 85-69-NN

DEPARTMENT OF THE ARMY,

Defendant.

ORDER

The plaintiff filed this action pursuant to 42 U.S.C. §§ 2000e, et seq. alleging that the Department of the Army discriminated against her on the basis of her race. Before filing an answer, the defendant moved this Court to dismiss, or in the alternative, to grant summary judgment due to the plaintiff's alleged failure to exhaust her administrative remedies in a timely manner. See 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1613.281.

The plaintiff resigned on February 10, 1983 under threat of dismissal. On April 18, 1983, she submitted a timely Equal Employment Opportunity (EEO) complaint to the Department of the Army. The Army rendered its final decision on January 17, 1985 which denied the plaintiffs' claim and set out the appropriate time limits for appeal. The decision also noted that the plaintiff was represented by counsel during the investigatory stage.

The plaintiff received notice on February 8, 1985 of the Army's final decision. On March 11, 1985, ten days too late as beyond the 20-day period provided for in 29 C.F.R. § 1613.233, the plaintiff appealed the Army's decision to the Equal Employment Opportunity Commission (EEOC). Because such appeal had to be filed by March 1,

1985, the EEOC dismissed it as untimely on July 10, 1985. In the meantime, the plaintiff had filed suit in this district court on May 14, 1985. Because the applicable regulation required that a district court suit had to be filed by March 11, 1985, the plaintiff's civil action was 63 days too late. The Army moves this Court pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, or in the alternative, to grant summary judgment pursuant to Rule 46. For the reasons set forth below, the Court GRANTS the defendant's motion and DISMISSES the plaintiff's action.

Title VII requires federal employees to make a complaint to an EEO counselor within 30 days of the alleged discrimination and to file a written

complaint with the agency within 15 days of the final interview with the EEO counselor. 29 C.F.R. § 1613.214(a)(1). After filing the EEO complaint with the agency, the employee can file suit in federal court either (1) after 180 days of the EEO complaint f the agency has not rendered a final decision, or (2) within 30 days of notice of any agency final decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1613.281(a) and (b).

After notice of the agency's final decision, the employee need not elect to go into federal court immediately. The employee may appeal the agency decision to the EEOC within 20 days of notice of the agency final decision. If the EEOC fails to render a final decision within 180 days of the appeal, then the employer can file in federal court after the 180-day period.

42 U.S.C. § 2000e-16(c); 29 C.F.R. 1613.281(d). If the EEOC renders a final decision, the employee must file in federal court within 30 days of the notice of the EEOC final decision. 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1613.281(c).

The present case involves one narrow issue: whether the EEOC's denial of the plaintiff's untimely appeal constitutes a "final action" under 29 C.F.R. § 1613.281(c) thereby triggering the 30-day period in which to file her civil action. The Army argues that a "final action" under § 1613.281(c) contemplates only decisions on timely filed appeals and not summary dismissals of time-barred appeals. Any other construction, the Army contends, would permit a party to create an otherwise

unavailable federal right of action simply by filling a late EEOC appeal - thereby triggering a new 30-day period upon its expected denial.

In an analogous context, the Unties States Court of Appeal for the Fourth Circuit has noted that "[s]uch a result would thus mock the thirty-day limitation for the institution of suit, incorporated in the statute, and would do violence to the obvious legislative purpose in the statute." Clarke v. Goode, 499 F.2d 130, 134 (4th Cir. 1974) (An EEOC denial of a request to reopen does not constitute a final action which restarted the 30-day clock); See also, Birch v. Lehman, 677 F.2d 1006 (4th Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

To rebut this concern, the plaintiff asserts that a denial of an untimely EEOC appeal should be

considered a "final action" only when the party filed the late EEOC appeal within the 30-day period for federal civil actions even though beyond the applicable 20-day period for EEOC appeals. This middle ground position has found the support of some courts within the analogous context of requests to reopen. Donaldson v. Tennessee Valley Authority, 759 F.2d 535 (6th Cir. 1985) (rejecting the Clarke-Birch precedent as unduly extending the concern for finality).

We decline to adopt the plaintiff's position because, in effect, it would recognize judicially a 10-day grace period for late EEO appeals, which the statute and regulations do not contemplate. Without clearer legislative direction, this Court should not extend its jurisdiction over unexhausted claims simply by characterizing a

summary denial of an untimely EEOC appeal as a "final action." Section 1613.281(c) contemplates EEOC consideration of timely filed appeals and untimely appeals that were nevertheless accepted by the EEOC under § 1613.233(c) (allowing the EEOC discretion to process appeals filed beyond the 20-day period). However, because neither the statue nor the regulations provided for the 10-day grace period proposed by the plaintiff, we decline to adopt such a construction through the manipulation of the term "final action."

The present case does not present a situation where a technical nuance, the elusive definition of "final action," closed the plaintiff's only avenue to the federal court. After the plaintiff filed her EEO complaint on April 18, 1983, she could have brought a

civil action at any time from October 25, 1983 (1980 days after EEO complaint) to March 11, 1985 (30 days after notice of final Army decision.)[1]

The plaintiff puts great weight on the fact that the EEOC appended a statement of rights form to its denial that advised here that she could file a civil action within 30 days. Although these routine attachments attempt to reflect the controlling law, they in no way govern the outcome of this case or direct the legal conclusion asserted by the plaintiff. See Clark, 499 F.2d at 134 (Statement of rights forms are a "part of a ritual employed customarily by the Commission.") I any event, the plaintiff ignored a similar statement of

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[1]Thirtieth day fell on Sunday, thereby extending period to Monday, March 11, 1985.

rights form issued by the Army that clearly set out the 20-day EEOC appeal period and the 30-day civil action period.

Finally, the plaintiff relies on McCall v. Brooks, 432 F.Supp. 640 (E.D. Pa. 1977), aff'd mem., 639 F.2d 774 (3rd Cir. 1980). In McCall, the United Sates District Court for the Eastern District of Pennsylvania held that a denial of an untimely appeal is a final EEOC action if: (1) the plaintiff filed the late appeal within 30 days of notice of the adverse employing agency action; (2) the plaintiff has a "reasonable belief" that the EEOC will waive the appeal time deadline and accept the untimely appeal. The plaintiffs in McCall delayed the filing of the EEOC appeal due to a death in the family of one of the complainants and a two-week vacation by another. The court held that these circumstances gave

the plaintiffs a reasonable expectation that a late appeal would be entertained by the EEOC. McCall, 432 F.Supp. at 644.

In the present case, the plaintiff does not asset that she expected the EEOC top accept her late appeal due to special circumstances nor does she assert any extraordinary facts that would justify a reasonable expectation of an excused appeal. Thus, to the extent the McCall reasoning comports to the law of this circuit, we hold that it is factually dissimilar to the case at bar.

In sum, after receiving notice of the Army's denial of her claim, the plaintiff had 20 days to file an EEOC appeal, or at her option, 30 days to

file a civil action. Because she accomplished neither, the present case must be DISMISSED.

It is so ORDERED.

_____
United States District Judge

Norfolk, Virginia

December 13, 1985

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ALICE G. UTSEY,

Appellant,

v. CIVIL ACTION
NO. 86-1018

DEPARTMENT OF THE ARMY,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that the appellant, Alice G. Utsey hereby appeals to the United States Supreme Court and will petition that Court for a Writ of Certiorari with regard to the judgment of this Court dated and entered on the 30th day of June, 1986, which affirmed the order of the United Sates District Court for the Eastern District of Virginia granting the appellee's motion to dismiss for lack of subject matter jurisdiction entered by said Court on the 13th day of December, 1985. This

appeal arises under the Civil Rights Act of 1967, as amended, specifically 42 U.S.C. Section 2000e-et seq.

ALICE G. UTSEY

By:_____
Of Counsel

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the foregoing Notice of Appeal was deposited in a United States post office, with first-class postage prepaid, and properly addressed to the Clerk of the United States Court of Appeals for the Fourth Circuit and to Justin W. Williams, Esquire, United States Attorney for the Eastern District of Virginia, Counsel for the Appellee, on the 29th day of September, 1986.

_____
F. O. Blechman

STATE OF VIRGINIA

CITY OF NEWPORT NEWS, to wit:

I, the undersigned, a Notary Public, in and for the Commonwealth of Virginia at Large, do hereby certify that F. O. BLECHMAN, whose name is signed on the foregoing Certificate of Service and Filing, has acknowledged the same before me in the City and State aforesaid.

Given under my hand this _____ day of October, 1986.

_____
Notary Public

My commission expires: _____

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20507

ALICE G. UTSEY,

Appellant,

v.

APPEAL NO. 01851363
AGENCY NO. 83-09-741

DEPARTMENT OF THE ARMY,

Agency.

DISMISSAL OF APPEAL

Appellant filed an appeal with this Commission from a final decision of the Agency concerning appellant's complaint of unlawful employment discrimination. The appeal was postmarked on March 11, 1985.

By regulation, appeals to the Commission must be filed within twenty (20) calendar days after an appellant receives notice of the final agency decision. Appeals are deemed filed on the date received by the Commission, unless postmarked earlier. 29 C.F.R. § 1613.233(a).

In this case, although the

agency's decision is dated January 17, 1985, the record does not show the date appellant received notice of it. In such circumstances, the Commission adopts a rebuttable presumption that the decision was received five days after the date of the decision. That presumption has not been rebutted here. Therefore, the appeal is untimely, and appellant has failed to submit adequate justification, pursuant to 29 C.F.R. § 1613.233(c), for extending the filing period beyond twenty days from the presumptive date of receipt.

Accordingly, the appeal is DISMISSED.

Statement of Appellant's Rights (R-1) is attached to this Dismissal.

FOR THE COMMISSION:

_____ Date

_____
Dolores L. Rozzi,
Director, Office of
Review and Appeals

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20507

STATEMENT OF APPELLANT'S RIGHTS

NOTICE OF RIGHT TO FILE A CIVIL ACTION

You are hereby notified that the attached decision in your case is final. You have the right to file a civil action in the appropriate United States District Court WITHIN THIRTY (30) DAYS from the date that you receive this decision. If any of your claims were based on the Age Discrimination In Employment Act of 1967 (29 U.S.C. § 633a), AS TO THOSE CLAIMS ONLY, you MAY have up to six years after the right of action first accrued in which to file a civil action. See, Lehman v. Nakshian, 453 U.S. 156 (1981); 29 U.S.C. § 633a(f); and 28 U.S.C. § 2401(a).

APPOINTMENT OF COUNSEL

If you decide to file a civil action and

do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq., as amended, the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 and 794c, as amended, you may request that the Court appoint an attorney to represent you. The Court may, in its discretion, appoint an attorney to represent you and may also permit you to file the civil action without payment of fees, costs, or security. If you want to request appointment of an attorney, your request must be FILED WITH THE COURT WITHIN THIRTY (30) DAYS from the date that you receive the Commission's decision.

NOTICE OF RIGHT

TO REQUEST REOPENING

The Commissioners may, in their discretion, reopen and reconsider the decision in your case if you submit a

written request and argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulations, or misapplication of established policy; or

3. The previous decision is of precedental nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

Your request should be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission,

2401 E Street, N.W., Washington, D.C. 20507.

FILING A REQUEST TO REOPEN WITH THE COMMISSION MAY NOT EXTEND THE TIME PERIOD ALLOWED FOR FILING A CIVIL ACTION. IF YOU WISH TO PRESERVE YOUR RIGHT TO FILE A CIVIL ACTION, THE CIVIL ACTION SHOULD BE FILED WITHIN THE TIME ALLOWED, EVEN IF YOU DECIDE TO REQUEST REOPENING BY THE COMMISSION.

Dolores L. Rozzi

DEPARTMENT OF THE ARMY

OFFICE OF THE ASSISTANT SECRETARY

WASHINGTON, D.C. 20310

17 JANUARY 1985

Ms. Alice G. Utsey
Box 264
APO N.Y. 09860

Docket Number: 83-09-741

Dear Ms. Utsey:

This is the Army's final decision on your equal employment opportunity complaint, dated 18 April 1983. Your alleged discrimination on the basis of race (black), when you resigned in lieu of termination from the position of Clerk Typist, GS-322-03, 200th Theater Army Material Management Center (200 TAMMC), Zweibruecken, Federal Republic of Germany.

I have reviewed and evaluated all of the information in your complaint file. I note that the U.S. Army Civilian Appellate Review Agency

Investigator recommended a finding of no discrimination which the Commander accepted. The Equal Employment Opportunity Commission Complaints Examiner, after a hearing, also recommended a finding of no discrimination. (A copy of the Complaints Examiner's report and of the hearing transcript is enclosed). Pursuant to my authority to issue a final decision on behalf of the Secretary of the Army, I have decided to adopt the Complaints Examiner's recommended finding of no discrimination because her report accurately states the facts and the conclusion is supported by the record.

The record shows that you were represented by Michael Ackerman, Esquire. However, since you did not prevail in this matter, you are not entitled to attorney's fees and costs.

This decision constitutes the agency's final decision on the matters about which you complained. If you are not satisfied with this decision, your appeal rights are as follows:

APPEAL RIGHTS

1. An appeal may be filed with the Equal Employment Opportunity Commission within 20 calendar days of receipt of this decision. The 20-day period for filing an appeal begins on the date of receipt of this decision. The appeal must be postmarked, or in the absence of a postmark, received by the Commission within 20 calendar days of the date of receipt of this decision. Statements or briefs in support of the appeal may be submitted up to 30 calendar days from the date the appeal is filed. The regulation providing for appeal rights, 29 C.F.R. Section

1613.233, is reproduced below pursuant to 29 C.F.R. Section 1613.221(e).

> "Section 1613.233 Time limits.
>
> (a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision of his or her complaint. An appeal shall be deemed filed on the it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in Section 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next stage of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal."

2. In lieu of an appeal to the Commission, a civil action may be filed

in an appropriate United Sates District Court within 30 calendar days of receipt of the decision.

3. If an appeal to the Commission if filed, a civil action may be filed in a United States District Court within 30 calendar days of receipt of the Commission's final decision.

4. A civil action may also be filed any time after 180 calendar days of the date of initial appeal to the Commission, if a decision has not been rendered.

5. If a civil action is filed, and complainant does not have, or is unable to obtain the services of a lawyer, the complainant may request the court to appoint a lawyer to represent him/her. In such circumstances as the court may deem just, the court may appoint a lawyer and may authorize the commencement of the action without the

payment of fees, costs or security. Any such request must be made within the above referenced 30-day time limit for filing suit and in such form and manner as the court may require.

6. Appeals to the Commission should be forwarded to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, NW, Washington, D.C. 20507. Any statement or brief in support of the appeal must be submitted to the Commission with two copies to the Director, Equal Employment Opportunity Compliance and Complaints Review Agency, Department of the Army, ATTN: SAMR-SFCR, Washington, D.C., 20310-1813, within 30 calendar days of filing the Notice of Appeal.

Docket Number

The docket number identified in the upper right-hand corner of page of

of this letter should be used on all correspondence to the Director of Equal Employment Opportunity or the Director, Equal Employment Opportunity Compliance and Complaints Review Agency.

Sincerely,

Delbert L. Spurlock, Jr.
Director of Equal
Employment Opportunity

42 U.S.C. § 2000e-16.

EMPLOYMENT BY FEDERAL GOVERNMENT

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial

branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of

this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of such department, agency, or unit shall comply with such rules,

regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such

department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

(c) Within thirty days of

receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if

aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 2000e-5(f) through (k) of this title applicable to civil actions

(d) The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency

or official of its or his primary responsibility to assure non-discrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

29 C.F.R. § 1613.22 TIME LIMIT

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award

attorney's fees or costs is made, the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(b) When issues of discrimination have been raised in a negotiated grievance process, a complainant may file a Notice of Appeal of such issues up to 20 days after: (1) Receipt of an agency decision on the grievance and expiration of the time during which the union and the agency may move the matter to the next state of the grievance process; (2) receipt of an arbitrator's award; or (3) receipt of the decision of the FLRA on exceptions to the arbitrator's award.

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written

statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

(Sec. 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, secs. 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 794a, sec. 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, sec. 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 206(d), Reorg. Plan No. 1 of 1978 (43 FR 19807) and E.O. 12106 (44 FR 1053))

[44 FR 34495, June 15, 1979, as amended at 48 FR 19707, May 2, 1983]

29 C.F.R. §1613.281 RIGHT TO FILE A CIVIL ACTION

§ 1613.281 Statutory right.

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court;

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint,

(b) After one hundred and eighty (180) calendar days from the date of filing a complaint with the agency if there has been no decision,

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission,

if there has been no Commission decision.

For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in § 1613.271(c).

(Sec. 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, Reorganization Plan No. 1 of 1978 (43 FR 19807) and Executive Order 12106 (44 FR 1053))

[45 FR 24133, Apr. 9, 1980]

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-671

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALICE G. UTSEY, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-671

ALICE G. UTSEY, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in affirming the district court's dismissal of her untimely Title VII action on the ground that equitable tolling was inapplicable on the facts of the case.

1. Petitioner, a black woman, worked as a civilian clerk-typist for the United States Army in West Germany. Her work performance proved unsatisfactory and her employment was terminated in February 1983 (Pet. App. A1 at 2).[1] Petitioner filed an Equal Employment Opportunity claim with the Army, asserting that her supervisors terminated her employment on account of her race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Army rejected her claim, and petitioner received notice of the Army's final decision on February 8, 1985 (Pet. App. A1, at 3).

The statutory provisions and regulations applicable to federal government employees presented petitioner with a number of options for further review of her discrimination

[1] Petitioner requested permission to resign in lieu of being fired and that request was granted (Pet. App. A1, at 2).

claim. First, she could appeal the Army's decision to the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1613.231. Under that option, she was required to file a notice of appeal with the EEOC within 20 days after receiving notice of the Army's decision. 29 C.F.R. 1613.233(a). Second, she could file a civil action in federal district court (1) within 30 days after receiving notice of the Army's final decision; (2) within 30 days after a final decision of the EEOC; or (3) at least 180 days after filing an appeal to the EEOC, if the EEOC had not issued a decision. 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281. Petitioner sought further administrative and judicial review of her discrimination claim, but failed to initiate review in a timely fashion. She filed a notice of appeal with the EEOC on March 11, 1985 (Pet. App. A1, at 3), 10 days after the 20-day filing period had lapsed. She filed a civil action in the district court on May 14, 1985 (*ibid.*), more than two months after the initial 30-day time period had lapsed.

On July 10, 1985, the EEOC dismissed her appeal as untimely (Pet. App. A1, at 3). Petitioner then argued that her pending district court suit could be treated as a timely civil action filed within 30 days after the EEOC's final action, even though the civil action was filed long before the EEOC issued its decision. Petitioner argued in the alternative that even if her suit was untimely, the time limits are not jurisdictional, and are subject to equitable tolling under this Court's ruling in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982).[2]

The district court rejected petitioner's contentions and granted the Army's motion to dismiss the action without discussing the issue of equitable tolling (Pet. App. A2, at

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[2] In *Zipes*, a case involving a private employer, this Court ruled that the 180-day provision in 42 U.S.C. 2000e-5(e) limiting the time for filing charges with the EEOC was not a jurisdictional prerequisite to suit in federal court. 455 U.S. at 393.

5-12). The court of appeals affirmed in an unpublished opinion (Pet. App. A1). It observed (*id.* at 6) that petitioner had failed to file her district court suit within 30 days after receiving notice of the Army's decision, as required under 49 U.S.C. 2000e-16(c) and 29 C.F.R. 1613.281(a). Assuming without deciding that the EEOC's dismissal of her appeal for untimeliness was "final action" that could trigger a renewed opportunity to pursue a district court action, the court determined that the action was nonetheless untimely because it was filed before the EEOC issued its decision and less than 180 days after petitioner filed her claim with the EEOC (Pet. App. A1, at 6-9). See 49 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281(c) and (d). The court concluded that it was unnecessary to determine whether these time limits are jurisdictional, holding that even if the time limits are not jurisdictional, the facts of petitioner's case do not provide a basis for equitable tolling (Pet. App. A1, at 9-13).[3]

2. Petitioner asks this Court to resolve two broad questions: (1) whether the time limits applicable to petitioner's civil action are jurisdictional; and (2) if the time limits are not jurisdictional, whether a Title VII plaintiff may invoke equitable tolling principles to preserve a claim against the federal government (Pet. 1-2). As the court of appeals held (Pet. App. A1, at 11), however, neither of these questions need be reached here. Even if one assumes that the time limits are not jurisdictional, the doctrine of equitable tolling would be inapplicable under the facts of this case. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984) (per curiam).

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[3] The court of appeals relied on this Court's decision in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984) (per curiam). In *Baldwin*, the Court concluded that a Title VII plaintiff who had failed to file a district court complaint within 90 days after the EEOC's issuance of a right-to-sue letter was not entitled to equitable tolling of the statutory time limit. 466 U.S. at 150-151.

The court of appeals was clearly correct in holding that equitable tolling is inapplicable here. The Army decision rejecting petitioner's charge of discrimination was accompanied by a standard notice, required by federal regulations (29 C.F.R. 1613.282), providing petitioner with a clear and unambiguous explanation of the time limits governing EEOC and judicial review (Pet. App. A5, at 3-7). Petitioner contends that the time period nevertheless should be tolled because she had difficulty in understanding that standard notice (Pet. App. A1, at 12). That contention does not provide a sufficient basis, even in cases involving private defendants, for tolling congressionally prescribed time limits. Equitable tolling is generally reserved for those instances where the notice is defective or where the plaintiff has been misled through some affirmative misconduct by the defendant. See *Baldwin,* 466 U.S. at 151.[4]

The court of appeals' decision here simply follows this Court's admonition in *Baldwin* (466 U.S. at 152):

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in *Mohasco* v. *Silver,* 447 U.S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

In all events, the court of appeals' determination that equitable tolling is inapplicable in this case presents a nar-

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[4] As the court of appeals noted (Pet. App. A1, at 12), petitioner's justification for equitable tolling also conflicts with her argument on the merits that she was fired because of her race and not because of her poor language skills.

row, fact-bound question that does not warrant this Court's review.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

[5] This Court denied a petition for a writ of certiorari in a case raising the same jurisdictional issue that petitioner seeks to raise here. *Stuckett* v. *United States Postal Service*, 469 U.S. 898 (1984). The dissenting opinion noted that the courts of appeals are not in accord as to whether the various time limits for filing actions under Title VII are jurisdictional. *Ibid.* (White, J., dissenting) (listing cases). The dissenting opinion also observed, however, that the jurisdictional issue was squarely presented because "[w]hether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor presented below."

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